UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MARSHALL BROWN	:	
	:	PRISONER CASE NO.
v.	:	3:05-cv-150 (CFD)
	:	
DONALD J. O'BRIEN	:	

RULING AND ORDER

Marshall Brown, an inmate confined at the MacDougall-Walker Correctional Institution in Suffield, Connecticut, brings this civil rights action pro se and in forma pauperis pursuant to 28 U.S.C. § 1915. He names as the defendant Donald J. O'Brien, the special public defender who represented him at his criminal trial. Brown was convicted of the state offenses of attempted murder, kidnaping, and carrying a pistol without a permit, and sentenced to 36 years' incarceration.

In his second amended complaint, the plaintiff alleges that Attorney O'Brien failed to adequately investigate his case and forced him to withdraw his speedy trial motions. The plaintiff seeks the dismissal of all charges against him and an order that his conviction and sentence be vacated. For the reasons that follow, the second amended complaint is dismissed.

I. Standard of Review

The plaintiff has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed in forma pauperis in this action. Pursuant to 28 U.S.C. § 1915(e)(2)(B), "the court shall dismiss the case at any time if the court determines that .

. . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915 (e)(2)(B)(i) - (iii). Thus, the dismissal of a complaint by a district court under any of the three enumerated sections in 28 U.S.C. § 1915(e)(2)(B) is mandatory rather than discretionary. See Cruz v. Gomez, 202 F.3d 593, 596 (2d Cir. 2000). However, "[w]hen an in forma pauperis plaintiff raises a cognizable claim, his complaint may not be dismissed sua sponte for frivolousness under § 1915 (e)(2)(B)(i) even if the complaint fails to 'flesh out all the required details.'" Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (quoting Benitez v. Wolf, 907 F.2d 1293, 1295 (2d Cir. 1990)).

> An action is "frivolous" when either: (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.'" Nance v. Kelly, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (quoting Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989). A claim is based on an "indisputably meritless legal theory" when either the claim lacks an arguable basis in law, Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam), or a dispositive defense clearly exists on the face of the complaint. See Pino v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995).

Livingston, 141 F.3d at 437. The court exercises caution in dismissing a case under § 1915(e) because a claim that the court perceives as likely to be unsuccessful is not necessarily frivolous. See Neitzke v. Williams, 490 U.S. 319, 329 (1989).

A district court must also dismiss a complaint if it fails to state a claim upon which relief may be granted. See 28 U.S.C. 1915(e)(2)(B)(ii) ("court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a

claim upon which relief may be granted"); Cruz, 202 F.3d at 596 ("Prison Litigation Reform Act . . . which redesignated § 1915(d) as § 1915(e) [] provided that dismissal for failure to state a claim is mandatory"). In reviewing the complaint, the court "accept[s] as true all factual allegations in the complaint" and draws inferences from these allegations in the light most favorable to the plaintiff. Cruz, 202 F.3d at 596 (citing King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999)). Dismissal of the complaint under 28 U.S.C. 1915(e)(2)(B)(ii), is only appropriate if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 597 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In addition, "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," the court should permit "a pro se plaintiff who is proceeding in forma pauperis" to file an amended complaint that states a claim upon which relief may be granted. Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

A district court is also required to dismiss a complaint if the plaintiff seeks damages from a defendant who is immune from suit. See 28 U.S.C. § 1915(e)(2)(B)(iii); Spencer v. Doe, 139 F.3d 107, 111 (2d Cir. 1998) (affirming dismissal pursuant to § 1915(e)(2)(B)(iii) of official capacity claims in § 1983 action because "the Eleventh Amendment immunizes state officials sued for damages in their official capacity").

II. **Discussion**

As mentioned, The plaintiff contends that he was convicted because Attorney O'Brien failed to provide him with adequate assistance of counsel. He asks the court to

order that all charges against him be dismissed and the sentence imposed on him by the Connecticut Superior Court be vacated. In a section 1983 action, however, the court cannot grant the plaintiff relief in the form of an order that he be released from imprisonment or that his sentence be vacated. See Prieser v. Rodriguez, 411 U.S. 475, 489 (1973) (when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or speedier release, his sole federal remedy is in habeas corpus); Mack v. Varelas, 835 F.2d 995, 998 (2d Cir. 1987) ("state prisoner may not bring a civil rights action in federal court under § 1983 to challenge either the validity of his conviction or the fact or duration of his confinement. Those challenges may be made only by petition for habeas corpus") (citing Preiser, 411 U.S. at 489-90). Such a request for relief must be made in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Even if the court were to construe the present action as a petition for writ of habeas corpus, the plaintiff has not alleged that he exhausted all of his available state court remedies prior to filing this action. See O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982) (A prerequisite to habeas relief under section 2254 is the exhaustion of all available state remedies); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a matter of federal-state comity. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors which may have crept into the state criminal process. See id. Ordinarily, the exhaustion requirement has been satisfied if the federal issue has been properly and fairly presented to the

highest state court either by collateral attack or direct appeal. See O'Sullivan, 526 U.S. at 843 (citing Brown v. Allen, 344 U.S. 443, 447 (1953)). "[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition." Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990).

The Second Circuit requires the district court to conduct a two-part inquiry. First, the petitioner must have raised before an appropriate state court any claim that he asserts in a federal habeas petition. Second, he must "utilize[] all available mechanisms to secure appellate review of the denial of that claim." Lloyd v. Walker, 771 F. Supp. 570, 573 (E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)).

The plaintiff does not allege that he has appealed his conviction or filed a state habeas petition challenging his conviction. Thus, the court cannot determine whether he has exhausted his state court remedies before commencing this action. Accordingly, the court cannot construe the complaint as a petition for writ of habeas corpus and the plaintiff's claims for injunctive relief are dismissed. See 28 U.S.C. § 1915(e)(2)(B)(i) and (ii).

Even if the plaintiff had sought damages, the amended complaint would not be cognizable under section 1983 because Attorney O'Brien was not acting under color of state law. A defendant acts under color of state law when he exercises "some right or privilege created by the State . . . or by a person for whom the State is responsible," and is "a person who may fairly be said to be a state actor." See Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Generally, a public employee acts under color of

state law when he acts in his official capacity or exercises his responsibilities pursuant to state law. See West v. Atkins, 487 U.S. 42, 50 (1988).

The Supreme Court has recognized an exception to the general rule for public defenders while they are performing the traditional function of counsel for criminal defendants. See Polk County v. Dodson, 454 U.S. 312, 317 (1981); Rodriguez v. Weprin, 116 F.3d 62, 65-66 (2d Cir. 1997); Housand v. Heiman, 594 F.2d 923, 924-25 (2d Cir. 1979). "[W]hen representing an indigent defendant in a state criminal proceeding, the public defender does not act under color of state law for the purposes of section 1983 because he 'is not acting on behalf of the State; he is the State's adversary.'" West, 487 U.S. at 50 (quoting Polk County, 454 U.S. at 323 n.13). Because the plaintiff's claims concern the adequacy of Attorney O'Brien's representation, he was not acting under color of state law. Thus, a claim for damages also would not be cognizable in this action. [1]

III. **Conclusion**

The second amended complaint is **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2)(B) (i) and (ii). However, if plaintiff wishes to convert this action into a

[1]Although the plaintiff alleges that he is a citizen of Jamaica and the defendant is a citizen of Connecticut, the court cannot construe the complaint as an action brought under the court's diversity jurisdiction because the plaintiff does not seek damages. Under 28 U.S.C. § 1332(a), "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between (2) citizens of a state and citizens or subjects of a foreign state . . . ." Thus, the plaintiff fails to meet the amount in controversy requirement.

habeas corpus petition, he may move to reopen this case within thirty days, also providing evidence that he has exhausted his state remedies.

SO ORDERED this 17th day of August, 2005, at Hartford, Connecticut.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE